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**DEPARTMENT OF DEFENSE**

**Office of the Secretary**

**32 CFR Part 199**

**[DOD-2011-HA-0076]**

**RIN 0720-AB53**

**TRICARE; Extended Care Health Option**

**AGENCY:** Office of the Secretary, Department of Defense.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of Defense (DoD) is publishing this proposed rule to establish TRICARE coverage under the Extended Care Health Option (ECHO) of Applied Behavior Analysis (ABA) for Autism Spectrum Disorders (ASD).

**DATES:** Written comments received at the address indicated below by (INSERT 60 DAYS AFTER PUBLICATION OF THE PROPOSED RULE IN THE **FEDERAL REGISTER**) will be accepted.

**ADDRESSES:** Comments may be submitted, identified by docket number and/or Regulatory Information Number (RIN) and title by either of the following methods:

- *Federal Rulemaking Portal:* [www.regulations.gov](http://www.regulations.gov). Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, Room 3C843, 1160 Defense Pentagon, Washington, D.C. 20301-1160.

*Instructions:* All submissions received must include the agency name and docket number or RIN for **Federal Register** document. The General policy for comments and other

submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Mr. Michael Kottyan, TRICARE Management Activity, Medical Benefits and Reimbursement Branch, telephone (303) 676-3520.

## **SUPPLEMENTARY INFORMATION**

### **I. Background**

In response to Section 717 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (NDAA FY 2007) [Pub. L. 109-364, October 17, 2006], DoD submitted to Congress in July 2007 the “Department of Defense Report and Plan on Services to Military Dependent Children with Autism.” The plan included a proposal to use the authority under 10 U.S.C. 1092 to conduct a Demonstration within the ECHO with a view to improving the quality, efficiency, convenience and cost effectiveness of providing services to eligible Active Duty Family Members (ADFM) diagnosed with one of the Autism Spectrum Disorders (ASD). Central to the Demonstration was the authority under 10 U.S.C. 1092 to provide reimbursement for the one-on-one Applied Behavior Analysis (ABA) services rendered by an individual who is not a TRICARE-authorized provider. Such non-certified individual, referred to in the Demonstration as a “Tutor,” is referred to in this proposed rule as an “ABA Tutor”. This rule requires that ABA Tutors meet the minimum requirements set forth in the current demonstration or, at the discretion of the Director, TRICARE Management Activity (TMA), the DoD may either adopt standards established in the future by a qualified accreditation organization as defined in title 32, Code of Federal Regulations (CFR), Section 199.2 (32 CFR. §199.2) or, after

review and analysis of the effectiveness of ABA Tutors with various levels of training, establish additional education, training or certification requirements for ABA Tutors. Although it is common practice to use ABA Tutors to render direct “hands-on” contact with those diagnosed with an ASD, currently there is no national certification process or governance body that sets uniform education, experience, oversight and disciplinary standards for Tutors.

The purpose of the Demonstration was to test whether a tiered delivery and reimbursement methodology for ABA services would 1) provide increased access to ABA services, 2) provide ABA services to those most likely to benefit from them, 3) ensure the quality of ABA services by utilizing a professional community of providers including providers certified by the Behavior Analyst Certification Board (BACB), and 4) determine whether requirements are being met for State licensure or certification where such exists.

Following publication of the “Notice” in the **Federal Register** on December 4, 2007 (72 FR 68130) the Department of Defense Enhanced Access to Autism Services Demonstration [the “Demonstration”] was implemented on March 15, 2008 for a two-year period.

To provide the DoD with information necessary to make sound judgments regarding payment for ABA services, it was determined that the Demonstration should be extended to collect sufficient comprehensive data. By “Notice” published in the **Federal Register** on February 26, 2010 (75 FR 8927) the Demonstration was extended until March 14, 2012, under the same terms and conditions in the original notice.

As required by 10 U.S.C. 1092, the DoD’s evaluation of the results of the Demonstration concluded that it was successful and upon final implementation of this rule intends to adopt a tiered ABA services delivery and reimbursement methodology.

Additionally, DoD found that the Demonstration:

- Contributed to parental perception of positive outcomes for eligible dependents, as evidenced by parental responses to the DoD survey;
- Increased the number of and access to the services of authorized ABA providers, as evidenced by the sustained three to five percent (3-5%) monthly growth in the number of Demonstration enrollees; and
- Contributed to improved military family readiness and retention as evidenced by parents of children enrolled in the Demonstration were more likely to say they will stay in the military as a result of the ABA services received by their child.

DoD believes the evaluation provides evidence supporting the position that the ABA services provided in the Demonstration may generally have had a positive impact on the lives of some of the children with autism and their families. The evaluation shows that the parents of dependent children with autism who responded to the DoD survey have a perception of positive impacts.

Therefore, to increase access to ABA services for ECHO-registered dependents who are diagnosed with an ASD, DoD is promulgating this rule to adopt the provider model of the Demonstration under the authority of 10 U.S.C. 1079(e) and to establish the requirements for ABA providers and reimbursement for ABA services.

This rule also proposes to establish that certain individual professional providers, specifically, psychiatrists, clinical psychologists, certified psychiatric nurse specialists, and clinical social workers, and other individuals who maintain current certification by the Behavior Analyst Certification Board (BACB) or comparable certifying entity as may be approved by the

Director, TMA, and, who maintain a current Participation Agreement with the Director, TMA, are eligible to be applied behavior analysis authorized providers.

This rule indicates that TRICARE coverage of ABA services is subject to the requirement in 32 CFR 199.5(d)(10). That is, services or items paid for, or eligible for payment, directly or indirectly by a public facility, as defined in 32 CFR 199.2, or by the Federal government, other than the Department of Defense, are excluded except when such services or items are eligible for payment under a state plan for medical assistance under Title XIX of the Social Security Act (Medicaid).

This rule also proposes to establish that the Director, TRICARE Management Activity will determine the requirements for ABA Authorized Providers and ABA Tutors, and the allowed amount of reimbursement for ABA services.

## **II. Summary of Regulatory Revisions**

32 CFR 199.5 addresses the DoD Extended Care Health Option (ECHO).

Section 199.5 is proposed to be revised to establish that Applied Behavior Analysis provided to address the effects of Autism Spectrum Disorders is an “Other service,” as that term is used in 10 U.S.C. 1079(e).

32 CFR 199.6 addresses TRICARE-authorized providers.

Section 199.6 is proposed to be revised to establish the requirements for designation as an “Applied Behavior Analysis (ABA) Authorized Provider” of ABA services to ECHO-registered beneficiaries diagnosed with an Autism Spectrum Disorder.

This rule also indicates that reimbursement may be made to an Applied Behavior Analysis Authorized Provider for ABA services rendered by ABA Tutors who work under the supervision and direction of an Applied Behavior Analysis (ABA) Supervisor.

### **III. Regulatory Procedures.**

#### **Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”**

Section 801 of title 5, United States Code, and Executive Orders (E.O.) 12866 and 13563 require certain regulatory assessments and procedures for any major rule or significant regulatory action, defined as one that would result in an annual effect of \$100 million or more on the national economy or which would have other substantial impacts. It has been certified that this rule is not a significant regulatory action.

#### **Public Law 104-4, Section 202, “Unfunded Mandates Reform Act”**

Section 202 of Public Law 104-4, “Unfunded Mandates Reform Act,” requires that an analysis be performed to determine whether any Federal mandate may result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector of \$100 million in any one year. It has been certified that this proposed rule does not contain a Federal mandate that may result in the expenditure by State, local and tribal governments, in aggregate, or by the private sector, of \$100 million or more in any one year, and thus this rule is not subject to this requirement.

#### **Public Law 96-354, “Regulatory Flexibility Act” (RFA) (5 U.S.C. 601)**

Public Law 96-354, “Regulatory Flexibility Act” (RFA) (5 U.S.C. 601), requires that each Federal agency prepare a regulatory flexibility analysis when the agency issues a regulation which would have a significant impact on a substantial number of small entities. This rule is not an economically significant regulatory action, and it has been certified that it will not have a significant impact on a substantial number of small entities. Therefore, this rule is not subject to the requirements of the RFA.

## **Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)**

This rule does not contain a “collection of information” requirement, and will not impose additional information collection requirements on the public under Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35).

## **Executive Order 13132, “Federalism”**

E.O. 13132, “Federalism,” requires that an impact analysis be performed to determine whether the rule has Federalism implications that would have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. It has been certified that this rule does not have Federalism implications, as set forth in E.O. 13132.

## **List of Subjects in 32 CFR Part 199**

Extended benefits for family members of Active Duty Service members, health care, autism spectrum disorders, applied behavior analysis, military personnel.

Accordingly, 32 CFR part 199 is amended as follows:

### **PART 199--[AMENDED]**

1. The authority citation for Part 199 continues to read as follows:

**Authority:** 5 U.S.C. 301; 10 U.S.C. chapter 55.

2. Section 199.5 is amended by adding paragraph (c)(8)(iv) to read as follows:

#### **§ 199.5 TRICARE Extended Care Health Option (ECHO).**

\* \* \* \* \*

(c) \* \* \*

(8) \* \* \*

(iv) *Applied Behavior Analysis (ABA) for ECHO-registered beneficiaries with an Autism Spectrum Disorder.* Applied Behavior Analysis (ABA) is an “Other service” as that term is used in 10 U.S.C. 1079(e), that may be reimbursed to an applied behavior analysis authorized provider to address the effects of an Autism Spectrum Disorder. Reimbursement for ABA services will be as determined by the Director, TRICARE Management Activity.

(A) Services provided by this paragraph are subject to the requirements of paragraph (d)(10) of this section.

(B) Definition of specific terms used in this paragraph and Section 199.6 of this part.

(1) *Applied Behavior Analysis (ABA) Authorized Provider.* An individual, a corporation, a foundation, or a public entity meeting the requirements of § 199.6(e)(2)(iv) of this part who or that provides ABA services to ECHO-registered beneficiaries diagnosed with an Autism Spectrum Disorder.

(2) *Applied Behavior Analysis (ABA) Services.* Such non-medical services determined by the Director, TMA to be appropriate to reduce the disabling effects of ASD for ECHO-registered beneficiaries, which may include, but are not limited to: conducting the initial and ongoing Functional Behavioral Assessments and Analysis; developing and revising as necessary the Behavior Plan that details the ABA intervention services and methods to be used; supervising or directing ABA Tutor(s); training the beneficiary’s primary caregivers to reinforce the interventions detailed in the Behavior Plan; and periodically reporting the beneficiary’s progress to the primary caregivers.

(3) *Applied Behavior Analysis (ABA) Supervisor.* An individual Applied Behavior Analysis (ABA) Authorized Provider who provides ABA Services through the supervision and direction of ABA Tutors. Only individuals who are Applied Behavior Analysis (ABA) Authorized



Providers may act as Supervisors. Corporations, foundations or public entities may not act as ABA Supervisors.

(4) *Applied Behavior Analysis (ABA) Tutor*. An individual who renders one-on-one ABA interventions to a TRICARE beneficiary diagnosed with an Autism Spectrum Disorder. ABA Tutors are not considered an “Authorized Provider” (refer to § 199.2 of this part) or an “Authorized Applied Behavior Analysis (ABA) Provider” and are not eligible for direct reimbursement by TRICARE.

(5) *Autism Spectrum Disorders*. The Pervasive Development Disorders listed in the *Diagnostic and Statistical Manual of Mental Disorders*, [DSM-IV-TR (fourth edition, text revision), 2000] , or a superseding current edition of the DSM, specifically, “Autistic Disorder”, “Rett’s Disorder”, “Childhood Disintegrative Disorder”, “Asperger’s Disorder”, and “Pervasive Development Disorder Not Otherwise Specified (including Atypical Autism)” *Applied Behavior Analysis (ABA) Authorized Provider*.

\* \* \* \* \*

3. Section 199.6 is amended by adding paragraphs (e)(2)(iv) through (e)(2)(iv)(D) in to read as follows:

**§ 199.6 TRICARE-Authorized Providers.**

\* \* \* \* \*

(e) \* \* \*

(2) \* \* \*

(iv) *ECHO Applied Behavior Analysis (ABA) Authorized Provider*.

(A) The following are authorized providers of Applied Behavior Analysis (ABA) services authorized by § 199.5(c)(8)(iv) of this part to address the effects of a diagnosed Autism Spectrum Disorder (ASD):

(1) Psychiatrists, clinical psychologists, certified psychiatric nurse specialists, and clinical social workers who provide ABA services within the scope of their license as an individual professional provider.

(2) Individuals who meet all ABA-related applicable licensing or other regulatory requirements of the state, county, municipality, or other political jurisdiction in which ABA services are rendered.

(3) Where such licensing or regulatory requirements referenced in paragraph (e)(2)(iv)(A)(2) of this section do not exist, an individual who maintains current certification by the Behavior Analyst Certification Board (BACB).

(4) A corporation, foundation, or public entity that renders ABA services and that meets all applicable licensing or other regulatory requirements of the state, county, municipality, or other political jurisdiction in which ABA services are rendered.

(B) All providers under paragraph (e)(2)(iv)(A) of this section shall maintain a current Participation Agreement with the Director, TRICARE Management Activity.

(C) Reimbursement for ABA Services may be made to the following:

(1) ABA Authorized Providers under paragraphs (e)(2)(iv)(A)(1) through (3) of this section for ABA Services provided by themselves directly to ECHO-registered beneficiaries or for the ABA Services rendered by ABA Tutors under their supervision and direction.

(2) ABA Authorized Providers under paragraph (e)(2)(iv)(A)(4) of this section for ABA Services provided to ECHO-registered beneficiaries when rendered in accordance with the

requirements of this Section by individuals employed by or under contract with an ABA Authorized Provider described in paragraph (e)(2)(iv)(A)(4) of this section.

Note: Tutors shall meet all requirements established by the Director, TRICARE Management Activity. Tutors are not “ECHO Applied Behavior Analysis (ABA) Authorized Providers” and are not eligible for direct TRICARE reimbursement for ABA services they render.

(D) TRICARE reimbursement for ABA services shall be the TRICARE allowed amount as determined by the Director, TRICARE Management Activity.

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Dated: December 23, 2011.

**Aaron Siegel,**

Alternate OSD Federal Register Liaison Officer,

Department of Defense.

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